

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Rickie Hill,  
  
Plaintiff  
  
v.  
  
Trashcan, et al.,  
  
Defendants

Case No.: 2:20-cv-01969-JAD-BNW

**Order Screening and Dismissing  
Complaint with Limited Leave to Amend  
by September 27, 2021**

[ECF No. 1-1]

Pro se plaintiff Rickie Hill brings this civil-rights action under 42 U.S.C. § 1983, claiming that High Desert State Prison Correctional Officer Trashcan, Lieutenant Jesus Ruiz, and Sergeant E. Thompson violated Hill's First, Eighth, and Fourteenth Amendment rights. Because Hill applies to proceed *in forma pauperis*,<sup>1</sup> I screen his complaint under 28 U.S.C. § 1915A. I find that he has not pled any colorable claims, dismiss the complaint, and give him until **September 27, 2021**, to amend his retaliation and equal-protection claims.

**Background<sup>2</sup>**

Hill is a 54-year-old, gay, Black, and Jewish man who suffers from diabetes and heart health issues.<sup>3</sup> Sometime before September 24, 2020, Trashcan searched Hill's cell and told him she hated his "lifestyle."<sup>4</sup> On September 24, 2020, Trashcan approached Hill's cell without wearing a mask, violating the Director of the Nevada Department of Corrections' directive

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<sup>1</sup> ECF No. 1.

<sup>2</sup> This is merely a summary of facts alleged in the complaint and should not be construed as findings of fact.

<sup>3</sup> ECF No. 1-1 at 4.

<sup>4</sup> *Id.* at 5.

1 requiring all staff to wear masks.<sup>5</sup> Hill asked Trashcan to put her mask on. Rather than doing  
2 so, Trashcan began yelling into a half-inch-wide opening in Hill's cell door. Hill felt "[s]everal  
3 spittle droplets" hit his face.<sup>6</sup> Trashcan told Hill she had an "asymptomatic" COVID-19  
4 infection, but that she "doubt[ed]" that she could pass it to him.<sup>7</sup> Trashcan also intentionally  
5 "spat droplets of spittle on Hill's face to instill fear," emotionally harm, and mentally scar Hill.<sup>8</sup>  
6 Trashcan did not treat any other similarly-situated prisoner similarly on that day. Hill claims  
7 Trashcan's actions were in retaliation for him suing "NDOC staff."<sup>9</sup>

8 Hill believes that his underlying health issues make him more vulnerable and more likely  
9 to die if he contracts COVID-19.<sup>10</sup> He believes "it is evident" that HDSP officers were trying to  
10 infect Hill with COVID-19,<sup>11</sup> and Ruiz failed to enforce the NDOC Director's mask  
11 requirement.<sup>12</sup> As a result of the incident with Trashcan and his interactions with Ruiz and  
12 Thompson, Hill now suffers from daily nightmares, depression, anxiety, and panic attacks  
13 because he fears catching COVID-19 and dying from it.<sup>13</sup>

14 Hill sues Trashcan for discriminating against him based on his sexual orientation and  
15 intentionally spitting on him to infect him with COVID-19.<sup>14</sup> I construe these allegations as  
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17 <sup>5</sup> *Id.* at 4.

18 <sup>6</sup> *Id.*

19 <sup>7</sup> *Id.*

20 <sup>8</sup> *Id.* at 5.

21 <sup>9</sup> *Id.*

22 <sup>10</sup> *Id.* at 5.

23 <sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 4–5.

1 Eighth Amendment claims for unsafe prison conditions and a Fourteenth Amendment equal-  
 2 protection violation. In addition, Hill sues Trashcan, Ruiz, and Thompson for First Amendment  
 3 retaliation.<sup>15</sup> Hill seeks compensatory and punitive damages as well as injunctive relief.<sup>16</sup>

#### 4 **I. Screening standard**

5 Federal courts must conduct a preliminary screening in any case in which a prisoner  
 6 seeks redress from a governmental entity or an officer or employee of a governmental entity.<sup>17</sup>

7 In its review, the court must identify any cognizable claims and dismiss any claims that are  
 8 frivolous or malicious, or that fail to state a claim upon which relief may be granted or seek  
 9 monetary relief from a defendant who is immune from such relief.<sup>18</sup> All or part of the complaint  
 10 may be dismissed *sua sponte* if the prisoner's claims lack an arguable basis in law or fact. This  
 11 includes claims based on legal conclusions that are untenable, like claims against defendants who  
 12 are immune from suit or claims of infringement of a legal interest which clearly does not exist, as  
 13 well as claims based on fanciful factual allegations or fantastic or delusional scenarios.<sup>19</sup>

14 Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot  
 15 prove any set of facts in support of the claim that would entitle him or her to relief.<sup>20</sup> In making  
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17 <sup>15</sup> Hill alleges that both Ruiz and Thompson retaliated against him for suing them in two separate  
 18 lawsuits. *See Hill v. Ruiz*, 2:20-cv-01569-RFB-NJK; *Hill v. Harper*, 2:20-cv-01655-KJD-DJA.  
 19 And although Hill alleges that both Ruiz and Thompson "failed to protect" Hill, he does not  
 20 allege any facts related to an Eighth Amendment failure to protect claim beyond those  
 21 conclusions. So, I construe the complaint to state retaliation claims only against Ruiz and  
 22 Thompson.

20 <sup>16</sup> ECF No. 1-1 at 6, 9.

21 <sup>17</sup> *See* 28 U.S.C. § 1915A(a).

22 <sup>18</sup> *See* 28 U.S.C. § 1915A(b)(1)(2).

23 <sup>19</sup> *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989); *see also McKeever v. Block*, 932 F.2d  
 795, 798 (9th Cir. 1991).

<sup>20</sup> *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999).

1 this determination, the court takes all allegations of material fact as true and construes them in  
 2 the light most favorable to the plaintiff.<sup>21</sup> Allegations of a *pro se* complainant are held to less  
 3 stringent standards than formal pleadings drafted by lawyers,<sup>22</sup> but a plaintiff must provide more  
 4 than mere labels and conclusions.<sup>23</sup> “While legal conclusions can provide the framework of a  
 5 complaint, they must be supported with factual allegations.”<sup>24</sup> “Determining whether a  
 6 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the  
 7 reviewing court to draw on its judicial experience and common sense.”<sup>25</sup>

## 8 **II. Screening Hill’s claims**

### 9 **A. Eighth Amendment**

10 Under 42 U.S.C. § 1997e(e), absent a more-than-*de minimis* physical injury or a sexual  
 11 act, an incarcerated person may recover injunctive relief and punitive damages, but not  
 12 compensatory damages, for mental or emotional injuries.<sup>26</sup> So, to the extent that Hill seeks  
 13 compensatory damages for emotional harm only, he cannot pursue such a claim. But because

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14 <sup>21</sup> See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).

15 <sup>22</sup> *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); see also *Balistreri v. Pacifica Police Dep’t*, 901 F.2d  
 16 696, 699 (9th Cir. 1990) (recognizing that pro se pleadings must be liberally construed).

17 <sup>23</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

18 <sup>24</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

19 <sup>25</sup> *Id.*

20 <sup>26</sup> 42 U.S.C. § 1997e(e); *Oliver v. Keller*, 289 F.3d 623, 626–30 (9th Cir. 2002) (holding that a  
 21 prisoner could not bring a claim for emotional harm when he alleged only that he suffered from a  
 22 painful canker sore and from back and leg pain resulting from sitting and sleeping on benches  
 23 and the floor); see *Young v. Levert*, 2021 WL 1546959, at \*8–9 (C.D. Cal. Apr. 20, 2021)  
 (holding that a prisoner could not seek damages for emotional harm resulting from failure to  
 provide him with a mask and exposing him to COVID-19 because he alleged that he suffered  
 emotional injuries but did not allege that he suffered any physical harm); *Kaiser v. Steuben Cnty.*  
*Jail*, 2021 WL 1380035, at \*1 (N.D. Ind. Apr. 12, 2021) (holding that a prisoner, who alleged  
 that five jail guards did not wear masks, could not pursue claims premised on emotional harm  
 where he did not allege that he contracted COVID-19 or suffered physical injury because of the  
 guards’ actions).

Hill also seeks punitive damages and injunctive relief in this action, his claim for emotional harm may proceed if it has a colorable Eighth Amendment basis.

The Constitution does not mandate comfortable prisons, but it does not permit inhumane ones.<sup>27</sup> The “treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.”<sup>28</sup> The Eighth Amendment imposes duties on prison officials to take reasonable measures to guarantee the safety of inmates and to ensure that inmates receive adequate food, clothing, shelter, and medical care.<sup>29</sup> To challenge conditions of confinement under the Eighth Amendment, a plaintiff must meet both an objective and subjective test.<sup>30</sup> The objective prong requires a “showing that the deprivation was ‘sufficiently serious’ to form the basis for an Eighth Amendment violation.”<sup>31</sup>

Under the subjective prong, a plaintiff must establish that prison officials were deliberately indifferent to serious threats to the inmate’s safety.<sup>32</sup> To be deliberately indifferent, a prison “official [must know] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference.”<sup>33</sup> Mere negligence is insufficient to show a violation of the Eighth Amendment.<sup>34</sup> And prison officials who actually

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<sup>27</sup> *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

<sup>28</sup> *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

<sup>29</sup> *Farmer*, 511 U.S. at 832.

<sup>30</sup> *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (citation omitted).

<sup>31</sup> *Id.*; see also *Williams v. Wood*, 223 F. App’x 670, 671 (9th Cir. 2007) (unpublished disposition) (holding that an inmate’s “speculative and generalized fears of harm at the hands of other prisoners do not rise to a sufficiently substantial risk of serious harm to his future health”).

<sup>32</sup> *Farmer*, 511 U.S. at 834.

<sup>33</sup> *Id.* at 837.

<sup>34</sup> *Id.* at 835–36.

1 knew of a substantial risk to inmate health or safety may be found to have violated the Eighth  
 2 Amendment only if they responded *unreasonably* to the risk, even if the harm ultimately was not  
 3 averted.<sup>35</sup>

4 I find that Hill fails to state a colorable claim for unsafe conditions of confinement.  
 5 Because he did not contract COVID-19, it is questionable whether his allegations meet the  
 6 Eighth Amendment’s objective prong.<sup>36</sup> Regardless, his allegations fail to satisfy the subjective  
 7 prong of an Eighth Amendment claim. Hill cannot show that Trashcan knowingly disregarded  
 8 an excessive risk to Hill because Trashcan told him she did not think that she could pass  
 9 COVID-19 onto Hill. So, even if Trashcan’s actions were intentional, they were more akin to  
 10 spitting on Hill, which, “while deplorable,” is not a constitutional violation.<sup>37</sup> Thus, I dismiss  
 11 this claim with prejudice as amendment would be futile.

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 14 <sup>35</sup> *Id.* at 844; *see also Hallinan v. Scarantino*, 466 F. Supp. 3d 587, 606 (E.D.N.C. 2020)  
 15 (recognizing that “[t]he fact that [prison officials’] response may prove inadequate to prevent the  
 spread of COVID-19 does not establish that they were deliberately indifferent.”).

16 <sup>36</sup> *Compare Jones v. Burt*, 2021 WL 2024705, at \*10 (W.D. Mich. May 21, 2021) (permitting  
 17 COVID-19-positive prisoner’s Eighth Amendment claims to proceed past screening against four  
 defendants who allegedly failed to comply with prison’s COVID-19 prevention policies) *with*  
 18 *Burchfield v. Jones*, 2021 WL 1976626, at \*6 (W.D. Ark. May 18, 2021) (dismissing conditions-  
 of-confinement claim alleging that prison officials exposed plaintiff to COVID-19 risk through  
 19 inadequate testing, because prisoner did not allege injury resulting from the conditions); *Ford v.*  
*Hutchinson*, 2021 WL 1433204, at \*3 (E.D. Ark. Apr. 6, 2021), report and recommendation  
 20 adopted, 2021 WL 1432321 (E.D. Ark. Apr. 15, 2021) (dismissing Eighth Amendment claim for  
 failure to meet either objective or subjective prong where prisoner alleged that prison officials  
 21 did not follow CDC guidelines to protect inmates from COVID-19 but did not allege that he  
 became sick or contracted the COVID-19 virus); *see also Helling*, 509 U.S. at 33–36 (holding  
 22 that a prisoner might state an Eighth Amendment claim for deliberate indifference to an ongoing  
 and unreasonable risk of serious damage to his future health if the risk is one that society chooses  
 not to tolerate, but prisoner would not be able to pursue his claim if he was not continuing to be  
 subjected to that risk).

23 <sup>37</sup> *Zavala v. Barnik*, 545 F. Supp. 2d 1051, 1059 (C.D. Cal. 2008), *aff’d sub nom. Zavala v.*  
*Barnik*, 348 F. App’x 211 (9th Cir. 2009).

1           **B.       Fourteenth Amendment**

2           Hill also alleges that Trashcan discriminated against him based on his sexual orientation  
3 because she told him that she hates his “lifestyle,” violating the Equal Protection Clause of the  
4 Fourteenth Amendment. The Clause protects prisoners from disparate treatment based on sexual  
5 orientation.<sup>38</sup> To state a colorable equal-protection claim, Hill must allege non-conclusory, non-  
6 speculative *facts* sufficient to show that a particular defendant *intentionally discriminated* against  
7 him *because* of his membership in a protected class.<sup>39</sup> Offensive statements about a prisoner’s  
8 sexual orientation are not sufficient to establish an equal-protection claim.<sup>40</sup>

9           I find that Hill fails to state a colorable equal-protection claim. Even though he alleges  
10 that Trashcan knows that Hill is gay, Black, and Jewish, that knowledge alone is insufficient to  
11 state a claim for an equal-protection violation. Hill does not provide any facts that would show  
12 that Trashcan took any action *because* of Hill’s sexual orientation. And while Hill states that  
13 similarly situated individuals were not treated the same way as him, he fails to identify who these  
14 similarly situated individuals were and how they were similarly situated to him.<sup>41</sup> So, I dismiss  
15 this claim without prejudice and with leave to amend.

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17 <sup>38</sup> See *United States v. Windsor*, 570 U.S. 744, 769–70 (2013).

18 <sup>39</sup> *Iqbal*, 556 U.S. at 678–83; see *Washington v. Davis*, 426 U.S. 229, 239–40 (1976); *Serrano v.*  
19 *Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003); *Jeffers v. Gomez*, 267 F.3d 895, 913–14 (9th Cir.  
2001); *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997), abrogated on other grounds by  
20 *Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008).

21 <sup>40</sup> *Freeman*, 125 F.3d at 738 (“As for being subjected to abusive language directed at [one’s]  
22 religious and ethnic background, verbal harassment or abuse ... is not sufficient to state a  
constitutional deprivation under 42 U.S.C. § 1983.”) (internal quotation marks omitted); see also  
*Ruiz v. Orozco*, 2020 WL 3058332, at \*6 (E.D. Cal. June 9, 2020), report and recommendation  
adopted, 2021 WL 352420 (E.D. Cal. Feb. 2, 2021).

23 <sup>41</sup> See *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (holding that, in an  
equal-protection claim, “[t]he groups must be comprised of similarly situated persons so that the  
factor motivating the alleged discrimination can be identified” but noting that “[a]n equal

### 1           C.       First Amendment

2           Prisoners have a First Amendment right to file prison grievances and to pursue civil-  
 3 rights litigation in the courts.<sup>42</sup> “Without those bedrock constitutional guarantees, inmates would  
 4 be left with no viable mechanism to remedy” injustices they suffer while incarcerated.<sup>43</sup> And  
 5 “because purely retaliatory actions taken against a prisoner for having exercised those rights  
 6 necessarily undermine those protections, such actions violate the Constitution quite apart from  
 7 any underlying misconduct they are designed to shield.”<sup>44</sup> To state a viable First Amendment  
 8 retaliation claim, a plaintiff must allege facts sufficient to show: “(1) a state actor took some  
 9 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, such action  
 10 (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not  
 11 reasonably advance a legitimate correctional goal.”<sup>45</sup> Total chilling is not required; it is enough  
 12 that a prison official’s acts would chill or silence a person of ordinary firmness from future First  
 13 Amendment activities.<sup>46</sup>

14           Timing may sometimes provide some circumstantial evidence of retaliatory intent when  
 15 adverse conduct takes place shortly after the plaintiff engages in protected conduct.<sup>47</sup> But  
 16 retaliatory intent is not established simply by showing adverse activity after the occurrence of

17 \_\_\_\_\_  
 18 protection claim will not lie by ‘conflating all persons not injured into a preferred class receiving  
 19 better treatment’ than the plaintiff”).

20 <sup>42</sup> *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004).

21 <sup>43</sup> *Id.*

22 <sup>44</sup> *Id.*

23 <sup>45</sup> *Id.* at 567–68.

<sup>46</sup> *Id.* at 568–69.

<sup>47</sup> *See Bruce v. Ylst*, 351 F.3d 1283, 1288–89 (9th Cir. 2000) (suspect timing of adverse conduct soon after protected conduct, combined with statements by defendants and evidence of pretext created triable issue of fact concerning retaliatory motive).



1 protected speech, rather the plaintiff must allege a “nexus” between the two events.<sup>48</sup> The  
 2 plaintiff must also show the absence of legitimate correctional goals for the conduct of which he  
 3 complains.<sup>49</sup> In addition, retaliation claims brought by prisoners must be evaluated in light of  
 4 concerns over “excessive judicial involvement in day-to-day prison management, which ‘often  
 5 squander[s] judicial resources with little offsetting benefit to anyone.’”<sup>50</sup>

6 Hill fails to allege a colorable retaliation claim against Trashcan, Ruiz, or Thompson. He  
 7 asserts that he engaged in protected conduct by filing lawsuits against various prison staff. But  
 8 he has failed to allege any facts that would show that any adverse action was taken against him—  
 9 let alone that such an adverse action was in response to his protected conduct. Hill’s conclusions  
 10 that the defendants “retaliated” against him are insufficient. I dismiss this claim without  
 11 prejudice and with leave to amend.

### 12 **III. Leave to amend**

13 I grant Hill leave to amend his First Amendment retaliation and Fourteenth Amendment  
 14 equal-protection claims only. If Hill chooses to file an amended complaint, he is advised that an  
 15 amended complaint replaces the original complaint, so the amended complaint must be complete  
 16 in itself.<sup>51</sup> He must file the amended complaint on this court’s approved prisoner-civil-rights

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18 <sup>48</sup> *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000); *Pratt*, 65 F.3d at 808 (“suspect  
 19 timing” of inmate’s transfer to different prison, without more, insufficient to support inference  
 20 that the transfer was done in retaliation for inmate’s exercise of First Amendment rights);  
 21 *Phillippi v. Patterson*, 599 F. App’x 288, 289 (9th Cir. 2015); *Rupe v. Beard*, 2013 WL 6859278,  
 22 at \*7 (E.D. Cal. Dec. 24, 2013).

<sup>49</sup> *Pratt*, 65 F.3d at 806.

<sup>50</sup> *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)).

<sup>51</sup> See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the original complaint is irrelevant; an amended pleading supersedes the original”); see also *Lacey v. Maricopa Cnty.*, 693 F.3d 896,

1 form, and it must be entitled “First Amended Complaint.” Hill must follow the instructions on  
 2 the form. He need not and should not allege very many facts in the “nature of the case” section  
 3 of the form. Rather, in each count, he should allege facts sufficient to show what each defendant  
 4 did to violate his civil rights. **He must file the amended complaint by September 27, 2021.**

### 5 **Conclusion**

6 IT IS THEREFORE ORDERED that the Clerk of the Court is directed to **FILE** the  
 7 complaint [ECF No. 1-1].

8 IT IS FURTHER ORDERED that:

- 9 • The Eighth Amendment unsafe prison conditions claim is **DISMISSED with**  
 10 **prejudice and without leave to amend;** and
- 11 • The First Amendment retaliation and Fourteenth Amendment equal protection  
 12 claims are **DISMISSED with leave to amend by September 27, 2021.**

13 IT IS FURTHER ORDERED that **the Clerk of the Court is directed to SEND** Hill the  
 14 approved form for filing a § 1983 prisoner complaint, instructions for the same, and a copy of his  
 15 original complaint [ECF No. 1-1]. If Hill chooses to file an amended complaint, he must use the  
 16 approved form and he shall write the words “First Amended” above the words “Civil Rights

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23 928 (9th Cir. 2012) (holding that for claims dismissed with prejudice, a plaintiff is not required to reallege such claims in a subsequent amended complaint to preserve them for appeal).

1 Complaint” in the caption. The amended complaint will be screened in a separate screening  
2 order, and **the screening process will take many months.** If Hill does not file an amended  
3 complaint by September 27, 2021, I will dismiss this action with prejudice for failure to  
4 state a claim without further prior notice.

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U.S. District Judge Jennifer A. Dorsey  
August 27, 2021  
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